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From Lisbon to Deauville: Practicalities of the Lisbon Treaty Revision(s)

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It has only been one year since the Treaty of Lisbon entered into force and already there is a stack of pending issues requiring primary law change in the EU. The Franco-German Deauville Declaration of 18 October 2010 is probably the most politically prominent of them all, yet it is not the first, nor will it be the last in a long, incremental process of constant treaty revision similar to the national process of amending national constitutions. All of these proposals have one feature in common: none of them is an overarching treaty change and each one is designed in such a way that amends only one element of the system. This, in theory, should avoid the need to submit the change to public referenda in the EU as part of the ratification process.

This paper explores the political difficulties of treaty reform in the context of five pending revisions. It first looks at the Deauville Declaration and its translation into political and legal reality. The second part is dedicated to the four other treaty revisions on the European agenda. Finally, it focuses on some of the potential problems in the ratification phase.

1. The Deauville Declaration

The Deauville Declaration of 18 October 2010[1] forms the basis of the Franco-German call for a proposal for treaty change. The following points are included:

- Establishment of a permanent European Financial Stability Facility (EFSF)-type mechanism, designed to safeguard the financial stability of the euro area, and
- Suspension of voting rights in Council for a member state found to be in serious violation of the basic principles of economic and monetary union (EMU).

Box 1. Treaty change in order to amend the Stability and Growth Pact (SGP) articles

- Initiator: Possibly a national government or group of states (ideally 27)
- Nature of proposal: Reform of Title VIII TFEU on economic and monetary policy *but* may include reforms not limited to Part Three TFEU (Art. 48 TEU applies; simplified revision procedure may be available depending on whether the reforms are confined to Part Three TFEU and do not increase Union competences)
- Content of proposal: Based on Deauville Declaration, establishment of a permanent EFSF-type mechanism and provides for suspension of voting rights in Council for a member state found to be in serious violation of the basic principles of EMU
- Process: Ordinary revision procedure (ORP) or simplified revision procedure (SRP)
    - o ORP: Convention is the default rule; likely to be a bone of contention between the European Council and the European Parliament
    - o SRP: Only if proposal is limited to Part Three TFEU and does not increase Union competences
- Timetable: Deauville Declaration envisages the changes to be introduced by 2013

[1] Franco-German Declaration on the occasion of the France-Germany-Russia tripartite meeting at Deauville on 18 October 2010 (available from the press service of the French Presidency at http://www.elysee.fr/president/root/bank_objects/Franco-german_declaration.pdf).

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The Declaration asks the President of the European Council to present a draft wording of the amending treaty in March 2011. However, the proposal can originate from the government of a member state or a group of them. The Deauville Declaration by the French President and the German Chancellor constitutes a beginning of the process leading to a formal proposal.

It is unclear at this stage – depending on the final wording of the amending treaty – whether the proposed treaty modification must take place via the ordinary revision procedure, or whether the simplified revision procedure will be available (see CEPS Policy Brief No. 215). There are two key questions in this regard: 1) Are Union competences increased by the nature of policy conditionality attached to a loan from the permanent EFSF-type mechanism or by a suspension of voting rights? 2) Is the reform limited to Part Three of the Treaty on the Functioning of the European Union (TFEU)?

While the proposals are limited to euro area states, the decision still requires unanimity among member states in the revision and ratification processes. Hence it is important to consider confining the application of the changes to only the member countries of the eurozone (17 in 2011) and countries with a legal obligation to adhere to the eurozone in the future (8 in 2011). Hence they would not apply to Denmark and the United Kingdom.

The draft wording of the proposal will determine the treaty amendment procedure. The advantage of the simplified revision procedure is that it saves time, as the European Council alone negotiates and adopts the reform proposal following consultations with the Commission, the European Parliament and, for institutional reforms in monetary policy, with the European Central Bank. Even an ordinary revision procedure without a Convention would take longer, as the role of the European Parliament is different (consent to the no-Convention mode in the ORP with exception vs. consultation in the SRP). The eventual disagreement between the Parliament and the European Council could result in a Convention being forced by the European Parliament, which would not be an ideal way to start a Convention. This is not to say that the Convention would necessarily derail the initiative; it is about saving time.

It is important for the successful adoption of the treaty change that the proposed text does not transfer powers to the European Union. In the case of the suspension of voting rights, the issue could be 'creatively' addressed by for example making reference to the procedure of Art. 7 TEU (suspension of rights) within Title VIII TFEU (i.e. Art. 119(3) TFEU, which talks about the *guiding principles* of EMU; Art. 126 TFEU, which already contains procedures by which to sanction member states that deviate from the SGP; or Art. 136 TFEU, which contains rules specific to euro area states). Such a proposal satisfies the first arm of the simplified revision procedure; i.e. that treaty changes are limited to Part Three of the TFEU. The problems would remain, however. First, the suspension of voting rights so far has been power on paper but never used or properly implemented. Second and most importantly, the issue of suspending rights in EMU may increase Union competences, which explains why the proposal has an alienating effect on many national governments and which may have a detrimental impact on the ratification process of the first Deauville idea of "establishment of a permanent and robust framework to ensure orderly crisis management in the future".

2. The Treaty-Changing Proposals on the Table

To date, there is only example of treaty reform since the Lisbon Treaty entered into force. It is also the first time the ordinary revision procedure has been used.

Box 2. Protocol amending Protocol (No. 36) on transitional provisions: the incarnation of the phantom MEPs

- Initiator: National government (Spain)
- Nature of proposal: amendment to a protocol (Art. 48 TEU applies; Ordinary Revision Procedure used)
- Content of proposal: increasing the number of seats in the European Parliament from 736 to 754 until the next elections in 2014
- Process: Ordinary revision procedure
    - Convention: European Council decided with the consent of the European Parliament not to convene a Convention; European Council defined IGC mandate
- Timetable: Target date of 1 December 2010 for completion of national ratification; all member states likely to ratify without major difficulty, limited time delay possible

The 2007 IGC set an ambitious target for the adoption of the Lisbon Treaty, which set a 'target date' of 1 January 2009 for entry into force. Had this target been met, elections to the European Parliament that took place on 7-9 June 2009 would have been organised under the Lisbon Treaty rules, which foresaw, inter alia, an increase in seats in the European Parliament for twelve national delegations. However, delays in the ratification process prevented the Treaty from entering into force until 1 December 2009, and elections to the European Parliament were therefore organised on the basis of the formula laid down in the Nice Treaty. This had the effect of reducing the number of MEPs that certain member states could have elected to the EP had the Treaty of Lisbon been applicable.

To appease such concerns, the European Parliament decided to grant the 18 additional MEPs 'observer' status only, which led to their being labelled "phantom MEPs". Once the Lisbon Treaty entered into force on 1 December 2009, the Spanish Government took the initiative under Art. 48(2) TEU (relating to the ordinary revision procedure) to submit to the Council on 4 December 2009 a proposal for the amendment of Art. 2 of the Protocol (No. 36) on transitional provisions. The General Affairs Council, under the Swedish Presidency at its meeting of 7 December 2009, agreed to submit this proposal to the European Council and notify national parliaments.

During its meeting on 10-11 December 2009, the European Council opened consultations with the European Parliament and the European Commission on the proposed amendments and requested that the European Parliament consent to the decision by the European Council not to convene a Convention. Letters were sent in this regard by the President of the European Council on 18 December 2009. On 28 April 2010, the European Commission gave its opinion on the proposal. On 6 May 2010, the European Parliament gave its opinion, as well as its consent not to convene a Convention.

On 17 June 2010, the European Council adopted "Decision [EUCO 11/10 of 17 June 2010] on the examination by a conference of representatives of the governments of the Member States of the amendments to the Treaties proposed by the Spanish Government concerning the composition of the European Parliament and not to convene a Convention". This Decision contained in annex a draft protocol amending the Protocol on transitional provisions, which constituted the terms of reference for the IGC. The same day as the European Council issued its Decision, the Spanish Presidency of the Council convened an IGC "for the purpose of determining by common accord the amendments to be made to the Treaties" (11192/10), which was held in Brussels on 23 June 2010. The text agreed by the European Council was approved by the IGC without changes. The Protocol has a 'target date' of entry into force of 1 December 2010, providing that all instruments of ratification have been deposed with the Italian Government by this date, or, failing that, on the first day of the first month following deposition by the final member state to ratify.

The next anticipated occasion to amend the Treaties is the Accession Treaty of Croatia. Even though it requires a different procedure, there is a precedent of including an issue that is often unrelated to the acceding state issue. For example, the Accession Treaty of Romania and Bulgaria altered the number of seats in the European Parliament for the Czech and Hungarian representatives (to 24 each) previously allocated to those states in the Treaty of Nice (22 each).

Box 3. Croatian accession to the EU

- Initiative: Common accord between all member states and the Croatian Government
- Nature of proposal: Accession treaty (Art. 49 TEU applies)
- Content of proposal: treaty amending the EU Treaties to allow for Croatian accession to the European Union
- Process: IGC
- Timetable: To take place following the signing of the treaty, expected for 2012; all member states likely to ratify without difficulty

Art. 49 TEU applies, whereby following the conclusion of negotiations between the EU and the Croatian Government, an accession treaty is drafted by an IGC. This text is then submitted to ratification in the Member States and in Croatia.

Two additional treaty changes waiting in the wings have long been thought as a natural to attachment to the next acceding country's treaty. These are the so-called 'Irish Guarantees' granted to that country ahead of the second Irish referendum in 2009 as well as the Czech demands for the opt-out from the application of the Charter of Fundamental Rights.

Box 4. Opt-outs: Protocols for the 'Irish Guarantees' and Czech accession to Protocol No. 30 on the application of the Charter of Fundamental Rights of the EU

- Initiative: Likely to be a national government concerned or the Commission
- Nature of proposal: New protocol to the EU treaties and amendment to an existing protocol (Art. 48 TEU applies; SRP not available in both cases *but* proposal may form part of the Croatian accession treaty, in which case Art. 49 TEU applies)
- Content of proposal: Making the 'Irish Guarantees' part of EU primary law and allowing for Czech accession to Protocol (No. 30) on the application of the Charter of Fundamental Rights
- Process: ORP *or* as part of Croatia's accession treaty
  - Legally it is not clear if the two protocols could be appended to the Croatian accession treaty, as this would be equivalent to circumventing Art. 48 TEU
  - If Art. 48 TEU is used, the ordinary revision procedure applies
  - Convention is the default rule, but unlikely in this case
- Timetable: Likely to be 2012 if part of the Croatian accession treaty; if not, Art. 48 TEU procedure could take place any time

The elements of changing the Protocols may in fact become part of an ever-changing landscape of the European Union. Apart from the above-mentioned Czech and Irish cases, many other states might also consider amending the treaties, e.g. the Polish government might re-consider its opt-out from the application of the Charter of Fundamental Rights following political change in the country. The Netherlands Antilles ceased to exist on 10 October 2010, yet they are still referred to in the Protocol 31. Or the Danish government (following a national referendum) could ask for a change in the Protocols, which grant the country opt-outs from EU immigration policy, defence cooperation, or possibly also the euro accession.

3. The 'rough ride' ahead

It is highly unlikely that the Deauville Declaration will be translated into a treaty change by 2013. There are a number of political and legal problems, most of which arise from the 'threat of referenda'. The current Austrian Chancellor Werner Faymann argued in 2008 that the "future changes on the EU treaty, which touch upon Austrian interest, should be decided through a referendum in Austria",[2] and has since reiterated this stance with regard to treaty change to SGP articles,[3] while the British government firmly stands behind the notion that any treaty resulting with a transfer of sovereignty from the UK to the EU would be a subject to a referendum in the United Kingdom.[4] Ireland and Denmark are two states which frequently hold referenda on EU treaties due to their constitutional requirements. Lastly, some critics point out to the fact that the new treaty change could face problems with the German Constitutional Court following the Karlsruhe 2009 ruling on the Lisbon Treaty. How to avoid those rocks?

First, the suspension of voting rights could, or perhaps should be revisited, depending on how great the opposition is towards this idea within the European Council. The more important element is about closing the loophole in the economic governance of the eurozone by establishing a permanent EFSF-type system. It could be worth sacrificing one element (suspension of voting rights) to protect the other change (a permanent EFSF-type mechanism). But this is a political argument that does not trump procedural barriers to ratification in the member states.

Second, any challenge to ratification brought before the German Federal Constitutional Court could be addressed by Chancellor Merkel by requesting a parliamentary constitutional majority in the Bundestag *before* she signs the amending treaty (or maybe even before Germany agrees to the opening of the IGC). At a later stage the parliament will also be involved in the ratification procedure. Although it is impossible to predict how the Court will view the treaty amendments, it is fair to assume that the German government has factored in a legal challenge and that the Deauville proposals should benefit therefore from a presumption of constitutionality. Indeed the main motivation behind the Deauville proposals may be to secure the constitutionality of German participation in an EFSF-type mechanism. Any challenge before the Court is likely to concern: 1) the legality of suspending voting rights in the Council; 2) alteration of the no-bailout clause (Art. 125 TFEU) and 3) the legality of an EFSF-type mechanism.

The challenge of referenda is probably the most difficult to avoid. It is often argued by those opposed to referenda that they are almost never on the topic at stake, and almost always about the popularity of the local government or president. In times of economic instability those politicians enjoy somewhat limited public trust. Hence should there be a referendum, the likelihood of a negative outcome in one or more places is considerably high. Therefore should there be no shift of sovereignty or powers towards the Brussels institutions, most of the arguments (i.e. from British and Danish) would be addressed.

The situation in Ireland, however, needs to be clarified. It seems that at this stage any inclusion in the treaty change of a mechanism that would suspend voting rights would trigger a referendum.[5] The likelihood of having a referendum on a EFSF-type mechanism to be inserted into the treaties is considerably limited due to the fact that Ireland has already adopted the EFSF itself (the same argument would be valid in Austria). Hence, a consideration that such a treaty change would have an impact on the Irish Constitution is limited. At the same time, one

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[2] V. Pop, "Austrian minister quits over EU referendum clause', *EU Observer*, 25 November 2008 (http://euobserver.com/9/27171).

[3] "Austria rules out Treaty change to solve euro crisis", Euractiv, 30 September 2010 (http://www.euractiv.com/en/euro/austria-rules-out-treaty-change-solve-euro-crisis-news-498281).

[4] The British government is currently drafting legislation that would enact a 'referendum lock' designed to require consultative referenda as part of the ratification process for future EU treaties (http://www.number10.gov.uk/queens-speech/2010/05/queens-speech-european-communities-amendment-referendum-lock-bill-50622).

[5] "Roche opposes German push for EU treaty changes", *The Irish Times*, 26 October 2010 (http://www.irishtimes.com/newspaper/world/2010/1026/1224282004413.html).

needs to remember that it is impossible to state with any accuracy the precise constitutional position, because the only tools available for assessing the situation is the Irish Constitution itself and one Supreme Court case from 1987.[6] The basic trigger for a referendum, according to the Supreme Court, is an evaluation (by the government or by the courts following litigation) that a treaty reform alters the "essential scope and objectives" of the Union. The Attorney General's Office is responsible for making this evaluation and presenting legal advice to the Government. Based on past precedent, the Attorney General's Office is likely to recommend a referendum for any controversial or wide-reaching treaty reform. Regardless of the legal position, however, the approach taken by the government since the 1987 Supreme Court decision has been more political than legal, with an *almost automatic decision to voluntarily use a referendum* for reform treaties as part of ratification rather than run the risk of being compelled by the Courts to hold a referendum.

So the issue on the Deauville proposal comes down to political risk: Will the Irish government run the gauntlet of ratification without a referendum, knowing that without doubt a 'concerned citizen' will undoubtedly take a case before the Courts? Given the current political climate in Ireland, if the government is seen to have tried to 'sneak' treaty reform under the radar and a referendum is forced by the Courts, it is almost certain that such a referendum will fail.

Yet even if everything goes smoothly with the courts and the referenda, individual politicians can hold the process up as was the case for a few weeks with the Lisbon Treaty in 2009. The Czech President Vaclav Klaus is known for his unpredictability when it comes to European affairs. One way of neutralising his potential opposition would be to link the Czech opt-out from the application of the Charter on Fundamental Rights to the Deauville process.

4. Conclusions

The first conclusion relates to the institutional developments: the process of treaty change becomes almost a Union institutional policy on its own. It is ongoing. Apart from the treaty changes on the table, out of which the Deauville proposals stand out as the most visible, future treaty changes could originate from the European Parliament. In the legislature there are discussions about e.g. the reform of the electoral law or about merging the positions of the Commissioner for Economic and Monetary Affairs with that of the Chair of the ECOFIN Council and the President of the Eurogroup.

The Deauville process is a valuable initiative, despite the critics calling it a "German obsession". It might be true that the legality of the EFSF could be challenged in Karlsruhe and the treaty change is the price Berlin asks the EU to pay. Is this price worth paying? If successful, the treaty change on the eurozone governance would close an important loophole, which in the first half of 2010 significantly undermined – and continues to challenge – the stability of the European monetary system.

[6] *Crotty v. An Taoiseach* [1987] IESC 4.

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